filed July 15, 1981

Case No. 80-6819

In The

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1980

JAMES CURTIS MC CRAY,

PETITIONER,

vs.

STATE OF FLORIDA,

RESPONDENT,

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

I

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION OF A DEATH SENTENCE CONTRARY TO A JURY PENALTY VERDICT OF LIFE IMPRISONMENT VIOLATES THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT, THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE OF THE EIGHTH AMENDMENT AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

A. The Imposition Of Death After A Jury Decision For Life Is Contrary To The Near-Unanimous Consensus Of The States And The Great Weight Of Professional Legal Opinion, Raising Grave Questions Of Constitutionality Under The Sixth, Eighth, and Fourteenth Amendments.

B. Florida's Practice, As Interpreted By The Highest State Court In Petitioner's Case, Is Based On The Mistaken Notion That A Final Jury Decision For Life Would Violate The Federal Constitution Indicating Violation Of The Eighth and Fourteenth Amendments.

C. Florida's Policy Of Overturning Jury Life Decisions Merely In Ordero [sic] Avoid Isolated "Errors" For Mercy Violates The Sixth And Fourteenth Amendment Values Held Applicable To Capital Penalty Juries In Witherspoon v. Illinois, 391 U.S. 510 (1968).

D. The Overturning At The State's Behest Of A Representative Jury's Verdict Against The Death Penalty Based Ontatutory Findings Of Fact Constitutes A Unique Double Jeopardy Situation Under The Fifth And Fourteenth Amendments.

E. Since The Overriding Of A Jury's Verdict For The Accused In A Trial Of Guilt Would Be Not Only Unconstitutional But Shockingly Unfair, Use Of This Procedure In The Penalty Phase Of A Capital Case Should Be Carefully Scrutinized Under The Due Process Clause Of The Fourteenth Amendment.

F. Infliction Of The Extraordinary And Controversial Sanction Of Death By an Unrepresentative State Judiciary, Contrary To The Verdict Of A Jury Of The People, Conflicts With The Scheme Of Limited And Representative Government Implicit In The Eighth And Fourteenth Amendments, And Violates The Principle Of Judicial Restraint.

G. It is A Violation Of The Petitioner's Due Process Rights Under The Fourteenth Amendment To Overrule The Jury's Life Verdict Where The Jury Has Properly And Reasonably Weighed The Aggravating Circumstances Against The Mitigating Circumstances.

H. Overruling The Jury's Life Verdict By A Biased Trial Judge Whose Decision Was Based On Non-Statutory Factors Violates The Due Process Clause Of The Fourteenth Amendment.

II

THE FAILURE OF THE FLORIDA SUPREME COURT TO DECIDE PETITIONERS DIRECT APPEAL FOR MORE THAN FIVE AND ONE HALF YEARS AFTER THE FILING OF BRIEFS AND ORAL ARGUMENT CONSTITUTES A DENIAL OF PETITIONER'S CONSTITUTIONAL RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENT.

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OPINION BELOW

The opinion of the Supreme Court of Florida is reported as McCRAE v. State, 395 So. 2d 1145 (Fla. 1981).

JURISDICTIONAL STATEMENT

Respondent accepts Petitioner's assertion that this Court's Jurisdiction is invoked under 28 U.S.C. § 1257 (3). Respondent denies that the issues asserted by petitioner were asserted or decided in any State Court below.

STATEMENT OF THE CASE

Respondent will accept petitioner's Statement of the Case for the purpose of determining jurisdiction. However, respondent cannot accept and specifically denies the portion thereof which asserts that petitioner raised the questions of the constitutionality of Florida's procedure allowing the overruling of the jury's "sentencing verdict" [recommendation] by the trial court in his main brief. (Appendix A attached hereto)

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Respondent denies petitioner's assertions contained herein.

REASONS FOR DENYING CERTIORARI

I

THE ISSUES RAISED BY PETITIONER HAVE NOT BEEN PROPERLY RAISED, PRESERVED OR PASSED UPON BY THE STATE COURTS BELOW.

In his petition for writ of certiorari, petitioner has raised two main issues, designated "I" and "II" with eight sub issues to main issue "I" designated "IA" through "IH". Petitioner further asserts in his STATEMENT OF THE CASE that he raised these constitutional questions in his main brief. He did not. (Appendix A attached hereto.)

A review of the decision below and the brief of appellant attached hereto as Appendix A reveals that the issues raised by petitioner were neither raised nor decided in the Supreme Court on direct appeal. Petitioner did raise an issue concerning the

constitutionality of the Florida Death Penalty Statute, Section 921.141, but not on the grounds alleged in this petition. All constitutional issues raised by petitioner below were decided adversely to petitioner's assertions in State v. Dixon, 283 So. 2d 1 (Fla. 1973) and Proffitt v. Florida, 428 U.S. 242 (1976). See McCrae v. State, 395 So. 2d 1145 at 1153 (Fla. 1981); Petitioner's "Brief of Appellant," Point IV, attached hereto as Appendix A.

Following the Supreme Court's decision below, petitioner did attempt to raise an Eighth and Fourteenth Amendment violation arising out of the decision of the trial court to overrule the jury recommendation of life and the five and one half year delay in deciding the appeal. (I 7-11 attached to petition). However, not even those issues were properly raised under Florida law and were therefore not considered by the Florida Supreme Court on rehearing. McCrae v. State, 395 So. 2d at 1155-1156 (Fla. 1981).

Florida law clearly states that an appellate court will not consider an issue, even of constitutional dimensions, which are raised for the first time on appeal. Silver v. State, 188 So.2d 300 (Fla. 1966); Whitted v. State, 362 So. 2d 668 (Fla. 1978). Nor is a Motion for Rehearing the proper vehicle for raising an issue which should have been raised, argued and decided in the hearing on the merits of the appeal. Florida Appellate Rule 3.14 (b) (1962 ed.). See e.g. English v. State, 31 Fla. 340,12 So. 689 (1893); Nelson et.al. v. Selden Cypress Door Co., 78 Fla. 203,83 So. 286 (1919); Russo v. State, 142 Fla. 596, 196 So. 293 (1940); Carter v. Fla. Dept. of H. & R. Services, 354 So. 2d 81 (Fla. 1st DCA 1978).

Issues I A-H and II were NOT raised, preserved or passed upon in the State Courts below. It was very early established that this Court will NOT decide federal constitutional issues raised here for the first time on review of state court decisions. Cardinale v. Louisiana, 394 U.S. 437 (1969). The issues asserted by petitioner should therefore not be considered now.

In any event, there is no constitutional right to jury sentencing in capital cases. See Westbrook v. Lalkcom, ___U.S.___, 66 L. Ed. 2d 298 (1980) [Justice White dissenting from the denial of certiorari.]

II

THE FAILURE OF THE FLORIDA SUPREME COURT TO DECIDE PETITIONER'S DIRECT APPEAL FOR MORE THAN FIVE AND ONE HALF YEARS IS MOOT BY RESOLUTION OF CONTROVERSY, HAS NOT BEEN PROPERLY RAISED IN THE STATE COURTS BELOW, AND DOES NOT PRESENT AN ISSUE TO WHICH A REMEDY EXISTS.

Respondent is aware of no remedy available to petitioner even assuming for argument's sake only that the Eighth and Fourteenth Amendments are in some manner implicated by the five and one half year delay of the Florida Supreme Court in deciding the appeal below. The Federal Constitution does not provide for a Speedy execution of the death penalty.

Without conceding that any such right exists, respondent can imagine an argument being made to the effect that some manner of due process or Sixth Amendment right might be offended by appeal delay if, but only if, the appellate court reverses a conviction for a new trial and the length of delay was intentional by the Court and has caused actual prejudice to the defendant's ability to present a defense on retrial. c.f. United States v. Marion, 404 U.S. 307 (1971); Barker v. Wingo, 407 U.S. 514 (1972).

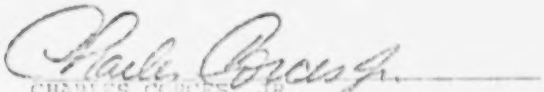
However, in the instant case, petitioner's judgment and sentence were affirmed, thereby resolving the controversy, before he even raised a constitutional issue concerning the delay in his motion for rehearing. By that time, the question came to late. By that time, the issue was moot. Respondent would also point out once again that the issue has not been properly presented to or decided by an state court. The question was improper for consideration on rehearing.

CONCLUSION

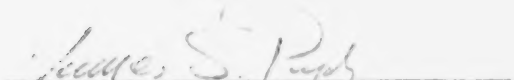
For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, CHARLES CORCES, JR., a member of the Bar of the Supreme Court of the United States and counsel of record for the State of Florida, Respondent herein, hereby certify that on July 13, 1981, pursuant to Rule 33, Rules of the Supreme Court of the United States, I served three copies of the foregoing Brief of Respondent in Opposition to Petition for Writ of Certiorari on Phillip M. Gerson, P.A., Attorney for Petitioner herein, by depositing such copies in the United States Post Office, Tampa, Florida, with first class postage prepaid, properly addressed to 2000 South Dixie Highway, Suite 212, Miami, Florida 33133.

All parties required to be served have been served.



OF COUNSEL FOR RESPONDENT